



**XVIII Airborne Corps and Fort Bragg  
Office of the Staff Judge Advocate  
Legal Assistance Office**



## **INFORMATION PAPER – PATERNITY**

### **1. WHAT'S SO IMPORTANT ABOUT PATERNITY?**

Paternity, or fatherhood, obviously is very important emotionally for the child concerned. A child raised without a known father may feel neglected and will miss an important adult figure in his or her life. More specifically “legal” reasons paternity matters include allowing the child to access the father’s medical history, accessing the father’s income for the purposes of child support, being able to inherit from the father upon the father’s death if the child is also legitimated (see below), and getting a share of the father’s government benefits (military and veterans’ benefits and Social Security are some key examples).

Mothers and fathers should care about accurate paternity determinations for the same reasons. In addition, men who are alleged to be fathers, or who have had fatherhood established but wish to contest paternity, need to know the law and processes involved in paternity determinations.

### **2. ARE YOU GOING TO TELL ME THAT MEN ALWAYS WANT TO AVOID BEING NAMED AS FATHERS?**

Not at all. Simply for ease of discussion, this Information Paper assumes that the mother’s parental relationship is a settled matter, but the law is gender-neutral to a large degree. Either parent or putative parent (or the child or Child Support Enforcement Agency) can use the various procedures below to establish the existence or nonexistence of a child-father or child-mother relationship. A parent can use these procedures to establish his or her own parental relationship or that of the other putative parent.

### **3. IS PATERNITY LAW THE SAME WHEREVER I LIVE?**

This Information Paper focuses on paternity law as it currently (fall 2012) exists in North Carolina. Significant changes came about in North Carolina paternity law effective January 1, 2012. Those familiar with pre-2012 North Carolina law should read this Paper for updated view of the subject. Individuals whose paternity determinations fall under the legal system of another state or country should read this Paper for some general principals but should speak with an attorney or otherwise research the specifics pertaining to the state or country in question.

### **4. WHAT DOES PATERNITY MEAN WHEN BOTH PARENTS ARE MARRIED TO EACH OTHER?**

If both parents are married to each other at the time of the child’s birth, or if the mother’s husband died within ten months of the child’s birth, the husband is legally presumed to be the child’s father. This is a very strong legal presumption and is difficult to defeat. The husband can rebut this presumption by genetic testing, incapacity to procreate, inability to access the mother/wife (possibly due to military deployment), or racial or other physical differences between the husband and the child.

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### 5. WHAT IF THE MOTHER IS UNMARRIED AND THE FATHER AND MOTHER BOTH WANT TO ESTABLISH THE FATHER'S PATERNITY?

The easiest way to establish paternity is with a willing father in the hospital upon the child's birth. If the father is present with photo identification, the mother and father each sign an Affidavit of Parentage, their signatures are notarized, and the Affidavit filed with the Vital Records office. If the father cannot sign the Affidavit at the hospital, he can do so at the local Child Support Enforcement office, the Vital Records office, or elsewhere in the presence of a notary. Once the Affidavit is filed with Vital Records, the child's birth certificate will reflect that the man signing is the father.

The Affidavit form itself is available on the North Carolina Courts' website: <http://www.nccourts.org/forms/Documents/266.pdf> or from your legal assistance attorney.

### 6. CAN THE MAN LATER CHANGE HIS MIND ONCE HE'S SIGNED THE AFFIDAVIT?

In a word...yes. The process depends on how long it has been since he's signed.

a. 60 Day Rule. Either the mother or putative (supposed) father can rescind the Affidavit within 60 days of signing it or before a court order establishing paternity or ordering child support, whichever comes first. Typically the father would wish to rescind his signature. To do so, he must request the local district court to order rescission and must serve all parties concerned – the mother, and the Child Support Enforcement Agency, if applicable – a copy of the request for rescission. If the court finds that the request is timely and all parties have been served, the court will order rescission. The clerk of court will send a copy of the order to Vital Records so the putative father's name can be removed from the child's birth certificate.

b. After 60 days. Effective January 1, 2012, a court may set aside an Affidavit even after 60 days if the court finds that a party signed the Affidavit due to fraud, duress, mutual mistake, or excusable neglect AND genetic testing shows the putative father is not the biological father. Consult a legal assistance attorney for definitions, examples, and strategy in alleging fraud, duress, mutual mistake, or excusable neglect.

The party asking that the Affidavit be set aside has the burden of proof. Again, typically, this is the putative father. He must allege fraud, etc, at which point the court will order the mother, child, and putative father to undergo genetic testing. If such testing excludes the man as biological father, the clerk will make sure the court's order gets to Vital Records so the man's name can be removed from the birth certificate.

### 7. MY CHILD'S FATHER DOES NOT WANT TO SIGN THE AFFIDAVIT. WHAT CAN I DO?

You cannot make him sign the Affidavit, but do try to encourage him to do so. It is cheaper, quicker, easier, and less public – and therefore less embarrassing – to sign an Affidavit than to have paternity established involuntarily.

That said, a mother faced with an unwilling father has some options. One is a civil action to establish paternity. The mother can start a civil action, meaning she sues the putative father to get the court to name him as the father. She does this by filing a complaint in court, attaching the birth certificate, and serving the complaint on the putative father. The court will then set a date for a hearing and serve the putative father with a summons to appear. The mother or father can request genetic testing and the court may order the mother, father, and child to submit to genetic testing. Such testing is required if the child is over three years old. Usually the party asking for testing must pay for the testing in advance.

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### **8. THERE ARE LOTS OF COURTS IN NORTH CAROLINA. DOES IT MATTER WHERE THE FATHER LIVES OR IF HE IS OUT OF STATE? DOES IT MATTER HOW I LET HIM KNOW ABOUT THE CIVIL ACTION?**

What court can hear your action – that is, what court has jurisdiction – and how you let the father know about the action – that is, service of process – are both extremely important considerations. North Carolina courts generally can decide paternity if the child is a North Carolina resident and the father either lives in North Carolina or has sufficient contacts with North Carolina. One such sufficient contact is an act of sexual intercourse in North Carolina that allegedly led to the child’s conception. You can file your action in the county where the mother, child, or putative father lives.

Jurisdiction is fairly easy to achieve because courts take a broad view of jurisdictional statutes. In contrast, courts take a narrow view of service-of-process laws and you must comply with them exactly. Examples of service include personal delivery to the putative father by yourself or via a process server or sheriff’s deputy; registered and certified mail delivery; or publication in the local newspaper for three weeks in a row if you do not know another way to reach the putative father. In any event, you must prove proper service to the court.

### **9. A CIVIL ACTION SOUNDS EXPENSIVE AND DIFFICULT. CAN SOMEONE HELP ME IN COURT?**

Obviously, suing someone is neither free nor easy. Legal assistance attorneys can advise you on the process but cannot themselves make filings or appearances in local civilian courts on your behalf. Speaking with a legal assistance attorney can help you decide whether you want to start your civil action by yourself – “pro se” – or whether you would like to hire an attorney to represent you.

If you would want to hire an attorney, you can use the North Carolina Lawyer Referral Service to speak with an attorney for up to 30 minutes for no more than \$50. During your conversation, see if you can arrange an acceptable fee schedule with the attorney. Remember, the attorney is a businessman or –woman and wants customers (i.e., clients). You are in the driver’s seat. Call the Lawyer Referral Service Monday-Friday (9:30 a.m. until 4:30 p.m.): in-state: 1-800-662-7660, out-of-state: 919-677-8574, Raleigh area: 919-677-8574. The Legal Assistance Office front desk has a handout about this service and information for those seeking a lawyer outside North Carolina.

### **10. I REALLY DON’T THINK I CAN AFFORD A CIVILIAN ATTORNEY AND, AFTER TALKING WITH LEGAL ASSISTANCE, I DON’T THINK I CAN FILE AND PROSECUTE AN ACTION MYSELF. AM I STUCK WITH NO FATHER FOR MY CHILD?**

Of course not! Establishing paternity, including locating the other putative parent, is one of the main services provided by the Child Support Enforcement (CSE) Agency, a North Carolina state government entity with local offices in each county. Such agencies are also known as “IV-D” agencies: if you read or hear something about a IV-D case, it means that the state agency is somehow involved. CSE is free for parents on public assistance and for foster families; such persons are automatically referred to CSE. Others desiring CSE assistance must apply – the fee is \$25, with a possible reduction to \$10 – and CSE will determine how it can assist you.

You can read more about CSE at the state CSE website <http://www.ncdhhs.gov/dss/cse/index.htm> or you can visit your county’s CSE office or county CSE office’s website.

Please bear in mind that a civilian attorney can help with the whole range of family law matters you may face, whereas CSE’s mission is more limited. For example, CSE will not help you with custody or visitation.

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### 11. IS THERE A TIME LIMIT FOR ESTABLISHING PATERNITY?

North Carolina allows you to bring an action to establish paternity any time before the child in question reaches eighteen years of age. This includes a CSE action. Certain time limits constrain a court's ability to adjudge paternity after the putative father's death. If the action was started before the putative father's death, the court can adjudge paternity after death. If there has been no proceeding started for estate administration within one year of the putative father's death, then a paternity action may be started within one year of the putative father's death. If, on the other hand, a proceeding for estate administration has been started within one year of the putative father's death, then a paternity action may be started within the statutory window (see G.S. § 28A-19-3) for presenting claims against the estate. Paternity will be established retroactive to the day before the father's death. Ask your legal assistance attorney for details.

### 12. TELL ME ABOUT GENETIC TESTING. HOW MUCH DOES IT COST AND WILL THE ARMY PAY FOR IT? WHAT IF I REFUSE TO GET DNA-TESTED?

Genetic testing can be done in a laboratory or in a CSE office. Usually, the party asking for such testing pays for testing in advance for all relevant parties (mother, father, child). Such a "package deal" usually costs several hundred dollars, is normally done by a cheek swab, and provides results within a few weeks, with greater costs for expedited services. Your legal assistance attorney has a list of labs. Shop around and/or ask for CSE assistance. The Army only pays for genetic testing done as part of health-related diagnosis or treatment. The Army does not pay for genetic testing for paternity actions.

If a court orders genetic testing, your refusal to obey the order can bring you into contempt of court, possibly resulting in fines, jail time, loss of your driver's license, and other adverse outcomes. Obey the court.

### 13. SO ONCE DNA PROVES I'M THE FATHER.... [DNA TEST NOT "PROOF" OF PATERNITY]

WAIT! Genetic testing, advanced as it is, does not "prove" you are the father. Genetic testing can only give a probability of paternity. If the probability is less than 85%, the court presumes you are not the father; if probability is over 97%, the court presumes you are the father. Whatever the genetic test results, either party can present other evidence in addition to genetic test results. Such evidence might include physical resemblance or nonresemblance, lack of access due to deployment, or the other party's cohabitation with a third person. Each party has full discovery rights and the defendant has a right to a twelve-person jury if timely requested.

Modern testing can over reach 99.9% or greater probability, at which point it may be sensible to stop your defense and admit paternity. Prosecuting or defending a contested paternity trial can be expensive, embarrassing, and perhaps even pointless if genetic testing seems conclusive compared to a dearth of other evidence. Talk to a legal assistance attorney about your particular facts. You can "beat" the DNA test but don't bet the farm on doing so.

### 14. LET ME REWORD THAT. ONCE THE COURT FINDS I AM THE FATHER, WHAT HAPPENS THEN? WILL I HAVE TO PAY CHILD SUPPORT?

#### I'M THE MOTHER. HOW TO I GET THE FATHER TO PAY CHILD SUPPORT?

a. Step one is to establish paternity by one of the methods described above. No dad: no child support. Dad: child support (absent unusual circumstances).

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b. Step two is to establish and enforce child support. CSE can do this, you can hire a civilian attorney, or you can appear pro se (for yourself). Once the mother, CSE, or attorney has petitioned the court and has presented the court the Affidavit, written agreement to provide child support, or paternity determination, the court will summon the father to appear and show cause why the court should not order him to pay child support. This may occur at the same time as paternity is established or at a later time.

c. Please see other legal assistance Information Papers for details about child support establishment, enforcement, and modification, and the many and serious consequences of nonsupport.

### **15. I AM NOT THE FATHER BUT THE COURT SAYS I WAS. WHAT CAN I DO?**

a. Paternity establishment action not in conjunction with child support. Again, 2012 brought a change in North Carolina law. You can now petition a court to set aside an order of paternity. Similar to setting aside an affidavit, you allege that the order was entered due to fraud, duress, mutual mistake, or excusable neglect, and either ask the court to order genetic testing of the three persons involved or agree with the others persons to get genetically tested. If the court determines, based on such testing, that the putative father is not the biological father AND the paternity order resulted from fraud, etc., then the court will set aside (cancel) the paternity order.

b. Relief from child support based on nonpaternity.

(1) If a court has already determined you are not the father by setting aside your Affidavit or a paternity order, petition the court to relieve you from child support obligations on that basis.

(2) As an independent civil action or in conjunction with a pending child support action, you can contest paternity and be relieved of a support obligation. You must do so within one year of the date when you knew or should have known you were not the father.

Your motion for relief must allege: 1) the particular bases on which you believe you are not the father; 2) that you did not acknowledge paternity (publicly stated or acted as the father) or you acknowledged paternity without knowing you were not the father; 3) you have not adopted or legitimated the child and you are not the child's legal father; and 4) you did not act to prevent the child's biological father from asserting his parental rights.

Upon either party's motion, the court may order genetic testing. If the court finds that genetic testing establishes nonpaternity AND the putative father either did not acknowledge paternity or did so without knowing he was not the child's father, then the court will end your support obligation.

(3) Penalties come with this new law. If the father acted in bad faith in bringing this action, the court can award attorney's fees to the mother. If the mother's fraud, duress, or misrepresentation made the putative father believe he was the biological father, the court may order the mother to reimburse the father such child support payments as he made to her after filing this action.

### **16. DOES THE ARMY CARE ABOUT PATERNITY?**

Army Regulation 608-99 addresses paternity, so yes, the Army does care about this topic.

a. Commanders will investigate inquires and allegations of paternity. Soldiers have the right to refuse questioning. Commanders will inform the inquirer the results of investigation, including whether the Soldier

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admits, denies, or refuses to discuss paternity, and in the latter two cases, will further advise the inquirer that only a civilian court can settle the matter.

b. A Soldier will comply with financial support provisions of court orders establishing paternity. If an order establishes paternity but does not address support, Soldiers will follow AR 608-99's regulatory support provisions. For the purposes of AR 608-99, "court order" includes functional legal equivalents, such as Affidavits of Parentage. AR 608-99's support provisions are punitive.

c. Absent a court order or functional equivalent establishing paternity, a Soldier need not support the child in question. The Soldier may, however, choose to do so, and if he does, he can receive BAH-DIFF if the sole basis for BAH is payment of child support. The Soldier may terminate support at any time for any reason absent a court order of paternity and/or support, but will lose BAH-DIFF. Commanders will assist in these processes.

### **17. QUESTION 1 MENTIONED LEGITIMATION. WHAT IS THAT?**

Legitimation is a separate action with different legal effects than an action to establish paternity. Basically, a non-husband father's successful action for legitimation completes the father-child relationship. The child can inherit real and personal property from and through the father and vice versa, whether under a will or in accordance with the Intestate Succession Act for those without wills, and the child can sue for the father's wrongful death, among other consequences. The child will get a new birth certificate with the legitimate father's name on it and, if the court orders, the child will also get the legitimate father's surname.

If a child is born out of wedlock and then the mother and putative father marry each other, this marriage legitimates the child.

To legitimate a child without marrying the other bio-parent, the putative father petitions the court and names the child, mother, and mother's husband, if applicable, as parties. Whether the mother is married or not, the court may order genetic testing of all concerned. See above or speak to your legal assistance attorney for information about jurisdiction and service of process.

### **18. IS THERE ANYTHING ELSE TO KNOW ABOUT PATERNITY?**

Probably! This Information Paper has not addressed paternity in the context of adoption or consent to a child's passport or travel outside the United States, two common legal assistance issues. Nor has this Paper addressed other states' laws, which may differ from North Carolina's laws. For example, Georgia allows fathers to sign affidavits to legitimate their children, whereas North Carolina requires a court proceeding. As another example, the majority of states have a Putative Father's Registry, allowing men who believe they may be or may become fathers to register and be more likely to receive actual notice of matters involving their children. Some states may require timely registry in order for a father to preserve his legal rights. North Carolina has no such registry.

In conclusion, think about your situation, read this Information Paper, ask your legal assistance attorney about your concerns, and be prepared for certain expenses and inconveniences related to establishing or contesting paternity.

### **19. REFERENCES:**

Army Regulation 608-99 [Army support obligations and expectations re paternity]

DoDFMR 260412A, 260416 [BAH and child support]

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North Carolina Session Law 2011-328 [An Act Establishing a Process to Set Aside an Order of Paternity or an Affidavit of Parentage Under Limited Circumstances, and to Allow Relief from a Child Support Order when the Obligor is not the Child's Father] [the new 2012 North Carolina law]

North Carolina General Statutes Chapter 49 [Legitimation, Civil Actions for Paternity], 50 [Child Support], 110-132 [Acknowledging Paternity]

North Carolina Legal Assistance for Military Personnel – Co-Counsel Bulletins – Paternity Claims [www.nclamp.gov] [information about genetic testing sites, jurisdiction, service of process, and much more]

North Carolina Child Support Enforcement website (Department of Health and Human Services > Division of Social Services > CSE)